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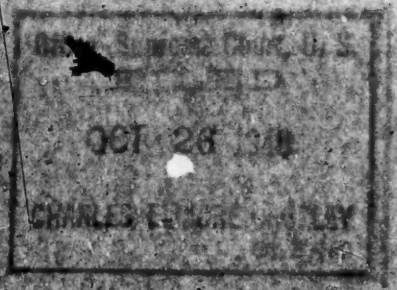

No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1948

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the District Court (R. 9–12) is reported at 68 F. Supp. 616. The opinion of the Court of Appeals for the Fifth Circuit (R. 21–23) is reported at 166 F. 2d 13.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1948 (R. 24). The petition for a writ of certiorari was filed on May 14,

1948, and was granted on June 21, 1948 (R. 26). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended, now 28 U. S. C. 1254.

QUESTION PRESENTED

Section 8 (f) (1) of the Longshoremen's and Harbor Workers' Compensation Act provides: "If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury." As defined elsewhere in the Act, "disability" means a reduction in earning capacity "because of injury"; and "injury" means "accidental injury or death arising out of and in the course of employment."

An employee who had previously lost the sight of his right eye became permanently and totally disabled through the loss of the sight of his left eye in an industrial accident. The previous loss of sight in the right eye did not result from an injury in the course of employment. The question presented is whether the court below was correct in holding, in disregard of the statutory definitions, that the term "previous disability" in Section 8 (f) (1) includes a prior physical injury not arising "out of and in the course of employment," and hence limits the employer's

liability only to compensation for the partial disability caused by the subsequent injury.

STATUTE INVOLVED

Relevant portions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 36–38.

STATEMENT

This suit was brought to review a compensation award under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. Sec. 901, *et seq.* (R. 2). John Davis, an employee of the Suwannee Fruit & Steamship Company, sustained an injury by accident, in circumstances entitling him to compensation under that Act, which resulted in the permanent loss of vision in his left eye (R. 6–9). At the time of this injury he had already lost the sight of his right eye (R. 3). The blindness in his right eye, however, had not been caused by any injury compensable under the Longshoremen's and Harbor Workers' Compensation Act or any other compensation act, and no compensation benefits had been paid to the employee on account of the loss of vision in his right eye (R. 4, 9). The record does not disclose any loss in earning capacity resulting from this earlier physical impairment. The loss of sight in the employee's left eye, combined with the preexisting blindness in his right eye, however, rendered him permanently and totally disabled (R. 6).

On May 14, 1945, the Deputy Commissioner for the United States Employees' Compensation Commission,[1] Sixth Compensation District, awarded the employee compensation for the loss of sight in his left eye (R. 3). At the same time it was ordered that the case be held open in order to determine whether an additional award should be made for permanent total disability (R. 3). On January 31, 1946, it was found that the employee was permanently and totally disabled, and an award of $8.09 per week during the continuance of the total disability was made against the employer and its insurance carrier, the Fidelity and Casualty Company of New York (R. 6–7).

The employer and the insurance carrier brought suit to set aside the award for total permanent disability on the ground that at the time of the injury the employee had "a previous disability" within the meaning of Section 8 (f) (1) and, consequently, that their liability was limited to compensation for the disability which would have resulted only from the injury to the employee's left eye (R. 4). The Government moved to dismiss the suit on the ground that under the statu-

[1] The functions of the United States Employees' Compensation Commission were transferred to the Federal Security Agency effective July 16, 1946. 1946 Reorganization Plan No. 2, Section 3, 11 F. R. 7873, 60 Stat. 1095. On the same day a Bureau of Employees' Compensation was established and the essential functions of the compensation commission were assigned to the director of the bureau. Federal Security Agency Order 58, 11 F. R. 7943.

tory definition "previous disability" was limited to prior physical defects resulting from industrial injuries. This motion was denied; the statutory definitions were considered inapplicable and the exemption was held applicable regardless of the origin of the prior physical defect (R. 11, 12). The employer was held liable only for permanent partial disability occasioned by the loss of one eye and the additional compensation for permanent total disability was directed to be paid from the special fund created by Section 44 of the Act (R. 11–12, 14). Since there were no issues of fact and the deputy commissioner did not desire to plead further, the award was set aside by the District Court (R. 14). This judgment was affirmed by the court below (R. 21–23).

SPECIFICATION OF ERRORS

The court below erred:

1. In failing to direct the District Court to dismiss the complaint.

2. In holding that the employer and the carrier were not liable for compensation for permanent total disability to the injured employee.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Act relieves employers from liability for part of the consequences of industrial accidents when the

damages resulting from the injury are increased by the existence of a previous disability. Section 8 (f) provides that the employer is required to "provide compensation only for the disability caused by the subsequent injury" if the employee was suffering from "a previous disability" at the time of the subsequent injury. As a result of this limiting provision, the employer's liability is for less than the amount necessary to make the employee whole under the statute's compensation standards. In some circumstances, this burden is borne by a special statutory fund; in others it is imposed upon the injured employee. Under defined conditions, when permanent total disability results from the combined effects of the previous disability and the subsequent injury, "the remainder of the compensation [not charged to the employer] that would be due for permanent total disability * * *, shall be paid out of the special fund established in section 44." Section 8 (f) (1). In all other cases, including all cases in which the disability is less than permanent and total, there is no provision for compensation from any other source. Section 8 (f) (2).

It is the Government's view that these exemptive provisions are applicable only if an employee has suffered a prior industrial injury which has resulted in disability. This result is required by interpreting Section 8 (f) in accordance with the statutory definitions. The occasion

for a limitation of liability is the existence of "a previous disability." Under subdivisions (2) and (10) of Section 2, a "disability" is defined as a reduction in earning capacity because of accidental injury "arising out of and in the course of employment." In the instant case there is no showing that the employee's preexisting physical impairment was the consequence of an industrial injury or that it resulted in a reduction in earning capacity. Only by rejecting the statutory definitions and reading previous disability "in its ordinary sense" (R. 22) was the court below able to bring respondents within the scope of Section 8 (f). We submit that neither the policy of the statute nor its legislative history justifies a departure from the normal statutory meaning.

Furthermore, the broad interpretation of the court below is opposed to the fundamental compensation principle of relieving employees of the burdens of industrial accidents. Section 8 (f) (1) purports to make the employee whole by providing for additional compensation out of a special fund. But the sweeping scope and indefinite nature of the exemption, as construed below, creates a real possibility that the fund may prove inadequate to meet the increased charges. In this event, the employee will be required to bear the loss. A broad interpretation will also extend the scope of Section 8 (f) (2) where no additional compensation is provided for the employee.

It is generally agreed that the policy of aiding handicapped workers, which is responsible for the enactment of provisions reducing the employers' liability, should not operate to defeat the fundamental purpose of relieving employees from the burden of industrial accidents. There is little question that the liability-relieving provisions in issue here have been incorporated in workmen's compensation legislation to encourage the employment of handicapped persons. The companion so-called second injury funds have been provided to assure full compensation to the employee notwithstanding the employer's curtailed liability. In weighing the problem of providing incentives to hire the handicapped and at the same time of establishing financially sound subsequent injury plans devoid of complicated administrative problems, the overwhelming preference, based upon experience with various types of plans, has been in favor of limited and specifically defined second injury provisions. By reading Section 8 (f) in accordance with the definitions in the Act, the specific type plan is attained. By disregarding these definitions in the manner of the court below, the exemptions assume that vague content which has earned the almost universal condemnation of workmen's compensation experts.

ARGUMENT

The issue in this case relates to the meaning of "previous disability" in Section 8 (f) of the

Longshoremen's and Harbor Workers' Compensation Act (Appendix, *infra*, pp. 36–37). Under Section 8 (f) (1) an employee who sustains a permanent total disability is entitled to be compensated in full. However, if he was suffering from a "previous disability" when injured, his employer's liability is limited to compensation for the disability which would have resulted from the subsequent injury alone. In such a case, the compensation of which the employer is relieved is paid out of a special fund created under Section 44 of the Act. However, if the prior physical defect did not constitute a previous disability", the employer must provide full compensation, without recourse to the Section 44 fund. Under Section 8 (f) (2), which applies in cases where the subsequent injury does not result in permanent total disability, the employer is required to provide compensation only for the disability attributable to the subsequent injury, and the injured employee has no recourse to the Section 44 fund.

In the present case the permanent total disability was produced by the combined effect of the subsequent injury and the preexisting physical impairment which did not result from an industrial accident. The question presented is whether such prior defect constitutes a "previous disability", within the meaning of Section 8 (f) (1). It is the Government's contention that "previous disability" is a term of art, expressly defined in the statute to

exclude injury not arising out of and in the course of employment", and that consequently Section 8 (f) (1) cannot be invoked here to enable the employer to shift to the Section 44 fund any part of his liability for full compensation for permanent total disability.

Our primary reliance is upon the clear definitions provided by Section 2 of the Act. Section 2 (10) defines "disability" to mean a reduction in an employee's earning capacity because of "injury"; and Section 2 (10) defines injury to mean "accidental injury or death arising out of and in the course of employment". "Injury" and "disability" are technical terms, the construction of which is determined by reference to the explicit definitions furnished by the statute.

However, we do not rest solely on the words of the Act. On grounds of policy, the Government urges that the interpretation of the court below, which permits the employer to disclaim partial liability whenever an employee's prior physical condition increased the disability resulting from the subsequent injury, is in conflict with basic principles of workmen's compensation legislation. The interpretation below creates a danger that the Section 44 fund may prove inadequate and be exhausted. In such event, the injured employee would not, as a practical matter, receive full compensation. Moreover, the construction below would have the further effect

of extending the employer's exemption from liability under Section 8 (f) (2), where the employee suffers a disability less than permanent and total; and under that subsection the employee cannot resort to the Section 44 fund. The result would be that the disabled employee would be denied compensation which the Act clearly contemplates that he should receive.

Our interpretation of Section 8 (f), which accepts rather than rejects the statutory definitions, receives support from the almost universal opinion of experts in the field that so-called second injury provisions, such as are contained in Section 8 (f), should be precise and specific in their construction and application. The special purpose of encouraging the hiring of handicapped workers, which these second injury provisions were designed to serve, ordinarily has been considered subordinate to the more basic purposes of workmen's compensation legislation, wherever conflict between them should arise. Thus, in order to maintain the solvency of second injury funds and to guard against the administrative delays resulting from vague provisions which would encourage wholesale defenses to claims, it has been considered necessary in employees' compensation legislation to have second injury exemptions specifically defined either by designating special classes of physical impairments to which they relate or by limiting their application

to prior industrial injuries. Although the legislative history of Section 8 (f) is quite barren on the specific point involved in this case, it does indicate in a general way that Congress intended the section to serve the usual purpose of comparable provisions. This purpose is best accomplished by faithful adherence to the definitions in the statute, particularly since all relevant policy considerations militate against converting Section 8 (f) by judicial interpretation into a general, undefined exemption extending to any preexisting physical infirmity, regardless of the circumstances in which it occurred and regardless of whether it impaired the employee's earning capacity.

I

UNDER THE STATUTORY DEFINITIONS "PREVIOUS DISABILITY" DOES NOT ENCOMPASS ALL PREEXISTING PHYSICAL DEFECTS BUT ONLY THOSE WHICH AROSE "OUT OF AND IN THE COURSE OF EMPLOYMENT"

Under the express definitions in the Act, the limitation of the employer's liability provided by Section 8 (f) applies only where the "previous disability" has resulted from a prior industrial accident. In this case, it affirmatively appears that the previous blindness in the right eye was not caused by an industrial accident. The employer's complaint seeking review of the compensation award recited that the blindness in the employee's right eye had not been "caused by an injury by accident arising out of and in the course of his

employment" and was not "compensable under the Longshoremen's and Harbor Workers' Compensation Act * * * or any other compensation act," and that no compensation benefits had been paid for the loss of vision in this eye (R. 3–4). The defendant moved to dismiss the action solely on the ground that the complaint failed to state a cause of action (R. 7), and this motion was denied by the district court (R. 8). Both courts below dealt with the case on the assumption that the employee had lost the sight of his right eye in circumstances not entitling him to compensation for such loss, and that no compensation benefits had been paid him for the loss of the right eye (R. 9, 21). The decision of the court below must therefore be taken to mean that any physical defect existing at the time of an industrial injury, whatever the cause, is a "previous disability" within the meaning of Section 8 (f) and, to the extent that it contributes to the disability resulting from the subsequent industrial injury, requires a *pro tanto* reduction in the employer's liability.

This interpretation cannot be squared with the statutory definitions. Although the term "disability", if used in a broad colloquial sense, might embrace a physical impairment of any character, however created, this meaning "is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of

all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The statute provides that "when used in this Act * * * 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury", and "the term 'injury' means accidental injury or death arising out of and in the course of employment." Section 2 (2) and (10). Applying these definitions, the phrase "previous disability" in Section 8 (f) means a previous incapacity to earn wages because of an industrial injury.

Only by rejecting these statutory definitions can the exemption be invoked, regardless of the nature and origin of the prior physical impairment. Ordinary rules of statutory construction, however, furnish no basis for rejecting the specific definitions which Congress has provided. The structure of the statute suggests that "disability" in Section 8 (f) has the same meaning as in other parts of the statute. Section 8 in its entirety deals with "compensation for disability." The term "disability" is used frequently throughout the section in its statutory sense. There would seem to be little justification for changing this meaning in one subsection of an otherwise consistent pattern without some statutory indication that this was intended.[2] The statute affords no

[2] In *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, 563, n. 5 (App. D. C.), the court said: "Throughout the fifty sections of the compensation act the words 'disability' and 'injury' are used repeatedly in their

evidence of such an intention. If Congress intended the exemption to extend beyond "disability" in the statutory sense, it would have been a simple matter, particularly in the light of the structure of Section 8, to have the provision read "previous disability or physical impairment" or some such broader phraseology.

Moreover, if the statutory test of disability is rejected for this single section, no alternative definition of "previous disability" is provided or available to give hard content to the standard the deputy commissioners will be required to apply. Since the exemption could be invoked regardless of whether the prior injury occurred in an industrial accident, such physical defects as a weak heart, diseased kidney, hernia, arthritis, or any other internal or external ailment which contributed to the consequences of a subsequent injury, could predicate an employer's claim to reduced liability. The deputy commissioners presumably would then be required to decide whether the employee was suffering from a physical defect at the time of injury and, if so, whether this contributed to the extent of the disability. The

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specially defined senses. Appellants would read them differently in § 908 (f). But 'disability' is used in some twenty other instances in § 908 itself, and in each instance it clearly carries its specially defined sense. We think Congress would have used a different word in § 908 (f), or would have added a qualifying phrase, if it had intended to refer to *incapacity* or *defect* from whatever cause and not merely to 'disability' as defined."

award against the employer would then be limited to the disability that would have resulted from the injury alone. In the absence of a specific statutory requirement, it should not be assumed that every physical ailment of an employee was intended to require an administrative decision with respect to whether it contributed to the consequences of a subsequent industrial injury. And in the absence of compelling evidence, Congress should not be presumed to have provided an exemption from substantial liabilities under the Act without some precise indication of the scope of the exemption. Not only will the allowance of such claims to reduced compensation create a departure from existing law (see cases cited pp. 17, 20–21, *infra*), but the duty of apportioning disabilities between injuries and prior ailments may prove an impossible one.[3] Cf. *Schurick* v. *Bayer Co.*, 272 N. Y. 217.

The broad construction of "previous disability" by the court below is also in conflict with decisions of the federal courts dating from the

[3] Some indication of the breadth of the term "disability," if the statutory definition be rejected, may be gleaned from its meaning in other contexts. In the administration of veterans' legislation, for example, virtually every physical disorder is considered a "disability" including such ailments as neuropsychiatric diseases, tuberculosis, bronchial asthma, gastric or duodenal ulcer, skin diseases, phlebitis, organic diseases of the heart, arthritis, and all the various communicable and infectious diseases and their residuals. Administrator of Veterans' Affairs, Annual Report (1947), p. 20; Ti. 38 CFR 1943 Cum. Supp. §§ 2.1100, 2.1137, 2.1172.

early days of the Longshoremen's and Harbor Workers' Compensation Act. *National Homeopathic Hospital Association* v. *Britton,* 147 F. 2d 561 (App. D. C.), certiorari denied, 325 U. S. 857; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. 2d 814 (W. D. Wash.); *Liberty Stevedoring Company* v. *Cardillo,* 18 F. Supp. 729 (E. D. N. Y.); *Wood Preserving Corp.* v. *McManigal,* 39 F. Supp. 177 (W. D. Ky.); *Seime-Spokane Co.* v. *Marshall,* Civil Action No. 640 (W. D. Wash.), decided April 1, 1943, not reported; *Temperance River Co.* v. *LaGarde,* 65 F. Supp. 161 (D. Minn.). These decisions all involved situations in which an industrial injury in combination with a preexisting physical impairment resulted in a greater disability than the subsequent injury alone would have produced.

In the *National Homeopathic* case, the court held that Section 8 (f) (1) did not apply unless the prior physical defect resulted from an accidental injury arising out of and in the course of employment. The court reached this conclusion by interpreting "previous disability" in Section 8 (f) in accordance with the definitions contained in Section 2 of the Act. In the remaining cases, the courts also held the prior physical defect not to be a "previous disability" within the meaning of Section 8 (f) and refused to abate the employer's liability for the full consequences of the injury.

The construction of "previous disability" which we urge finds support not only in these federal court decisions but also in decisions of the state courts of New York interpreting a comparable relieving provision in its workmen's compensation law before its amendment in 1944.[4] These decisions consistently refused to reduce the employer's liability where a previous physical impairment existed which was "not caused by an industrial accident." *LaBelle* v. *Britton Stone & Supply Corp.*, 247 App. Div. 843; *Van Ooteghem* v. *Sisters of the Good Shepherd*, 249 App. Div. 898; *Bervilacqua* v. *Clark*, 225 App. Div. 190, affirmed, 250 N. Y. 589; *Pyshnack* v. *Henry Forge & Tool, Inc.*, 272 N. Y. 546, affirming 247

[4] The New York statute has frequently been referred to as the model for the federal law. See, *e. g.*, H. Rep. 1357, 70th Cong., 1st sess., p. 2; *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 411 (App. D. C.); *Employers' Liability Assur. Corp., Ltd.* v. *Monahan*, 91 F. 2d 130 (C. C. A. 1); *Luckenbach S. S. Co., Inc.* v. *Marshall*, 49 F. 2d 625 (D. Ore.). New York Workmen's Compensation Law, Section 15 (7), prior to the 1944 amendments, provided as follows: "The fact that an employee has suffered *previous disability* or received compensation therefor shall not preclude him from compensation for a *later injury* nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a *previous disability* shall not receive compensation for a *later injury* in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." [Italics supplied.]

App. Div. 842; *Finegan* v. *Mintern & Son*, 270 App. Div. 868; with *Schurick* v *Bayer Co.*, 272 N. Y. 217, compare *Anderson* v. *Babcock & Wilcox Co.*, 256 N. Y. 146. But cf. *Lehman* v. *Schmahl*, 179 Minn. 388.

The force of the statutory terms and the context of the provisions, together with the consistent interpretations of the courts, would seem to furnish sufficient basis to reject the expanded scope which the decision of the court below gives to Section 8 (f). Additional reasons for avoiding such a construction of the exemption, however, are to be found in the fundamental purpose of workmen's compensation legislation.

II

ADHERENCE TO THE EXPRESS STATUTORY DEFINITION OF "PREVIOUS DISABILITY" ACCORDS WITH THE POLICY OF WORKMEN'S COMPENSATION LEGISLATION

A. By giving extended scope to the phrase "previous disability" in Section 8 (f), thereby expanding the area of the employer's freedom from liability, the court below created the danger of requiring employees to assume a substantial part of the costs of industrial accidents—a result which is in direct conflict with the purpose of workmen's compensation legislation to relieve employees of these burdens. *National Homeopathic Hospital Ass'n* v. *Britton*, *supra* at 564. The court's interpretation also constitutes a departure,

not justified by the statutory language, from accepted standards of legal responsibility.

The limitation of an employer's liability because of a preexisting physical ailment, which is the effect of the decision below, is contrary to the usual rule of liability in tort and under workmen's compensation laws. *Restatement of Torts, Negligence*, § 461; Harper, *Law of Torts* (1933), §§ 113, 129, 214. Under this and other workmen's compensation statutes, the courts have frequently rejected as a defense to a compensation award an employee's prior physical infirmity. This has been so where the subsequent disability would not have occurred but for the prior physical defect (*Pacific Employers' Ins. Co.* v. *Pillsbury*, 61 F. 2d 101 (C. C. A. 9); *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co.* v. *Hoage*, 75 F. 2d 677 (App. D. C.), certiorari denied, 295 U. S. 733; *Hoage* v. *Royal Indemnity Co.*, 90 F. 2d 387 (App. D. C.), certiorari denied, 302 U. S. 736), and where the extent of the disability has been increased because of the previous disability. *Warlop* v. *Western Coal & Mining Co.*, 24 F. 2d 926 (C. C. A. 8); *New Amsterdam Casualty Co.* v. *Cardillo*, 108 F. 2d 492 (App. D. C.); *Great Atlantic & Pacific Tea Co.* v. *Cardillo*, 127 F. 2d 334 (App. D. C.).

In many cases presenting factual situations virtually identical with that in the instant case,

where the employee had previously lost the use of one eye or some other member and thereafter lost the remaining member in an industrial accident, the employer has been held liable for compensation for total and permanent disability. See, *e. g., Killisnoo Packing Co.* v. *Scott,* 14 F. 2d 86 (C. C. A. 9); *Moore* v. *Western Coal Mining Co.,* 124 Kans. 214; *Liptak* v. *Industrial Accident Comm. of California,* 200 Cal. 39; *In re Braconnier,* 223 Mass. 273; *Wabash Railway Co.* v. *Industrial Commission,* 286 Ill. 194; *Nease* v. *Hughes Stone Co.,* 114 Okla. 170. The rationale of these decisions is that the employee was using in his employment whatever earning capacity he enjoyed at the time. This capacity may have been reduced by the prior loss of an eye or leg or by some other infirmity. Presumably reduced efficiency would be reflected in reduced earnings. The industrial accident completely and permanently destroyed this remaining earning capacity and it was for the complete loss of this earning capacity that the employer was held liable in accordance with the usual principles of compensation legislation. The award, of course, would be based on the employee's earning capacity at the time of injury. The results reached in these cases reflect the general policy of workmen's compensation statutes that industry rather than the individual workman should bear the burden of industrial accidents. See Dodd, *Administration of Workmen's Compensation* (1936), pp. 664, 674.

An expanded interpretation of Section 8 (f) creates the real possibility that many of these burdens will be reimposed on employees by threatening the solvency of the Section 44 fund to which employees must turn for complete compensation in permanent total disability cases (Section 8 (f) (1)) and by broadening the present extremely limited scope of all other combined disability cases in which no provision is made for paying employees the compensation from which the employer is relieved. Section 8 (f) (2).

The provision of Section 8 (f) (1) for additional payments from the special fund in cases of permanent total disability may prove inadequate to protect the employee because of the threat to the fund's solvency which the additional burdens resulting from a liberal reading of the term "previous disability" may create. See *National Homeopathic Hospital Ass'n v. Britton*, 147 F. 2d at 564. The resources of the special fund available for additional compensation are limited. The fund consists principally of payments of $1,000 as compensation for the death of employees from injury where there is no person entitled to compensation for this death. Section 44 (c). Only one-half of the no-dependency death payments made into the fund are available for additional compensation under Section 8 (f). Section 44 (c) (1). Neither the United States nor the Administrator is liable for any of the charges

against the fund authorized by Section 8 in excess of the amount actually deposited in the fund. Section 44 (c). The danger of exhaustion has been increased by the recent amendment to the Act which removed the $7,500 maximum payment limitation. Act of June 24, 1948, Pub. Law No. 757, 80th Cong., 2d sess. The balance in the fund on June 30, 1948, was $579,527.11. During the year ending June 30, 1948, $30,544.17 was paid into the fund. Only half of these amounts are available for subsequent injury payments. The danger of exhausting second injury funds where, as in the instant case, contributions consist principally of $500 no-dependency death payments and the claims which may be made against the funds are not specifically circumscribed has been recognized by workmen's compensation experts. United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 2; International Association of Industrial Accident Boards Bulletin No. 1, Discussion of Industrial Accidents and Diseases (1944), pp. 19, 199, 202. See discussion p. 32, *infra*.

The likelihood of imposing the burdens of industrial accidents on employees by enlarging the meaning of "previous disability" appears more clearly with respect to Section 8 (f) (2). That section contains no provision for additional compensation to the employee and any reduction in

the employer's liability must be borne by the employee. Although Section 8 (f) (2) is not directly involved in the present case, the term "previous disability" obviously must have the same meaning in both subsections of Section 8 (f). Hence it is relevant in construing Section 8 (f) (1) to consider the implications with respect to Section 8 (f) (2). As previously indicated, Section 8 (f) (2) provides that in all cases in which an employee receives an injury following a previous disability, except those covered by Section 8 (f) (1), "the employer shall provide compensation only for the disability caused by the subsequent injury." Thus in cases of all injuries, which together with previous disabilities, result in disabilities less than permanent and total, the deputy commissioner is required to determine whether the previous disability increased the disability resulting from the subsequent industrial injury and to eliminate this increase from the compensation award. The employee is required to bear the burden of any excess loss in earning capacity resulting from the combination of the two disabilities. Under the interpretation of the term "previous disability" as restricted to one resulting from prior industrial accidents, we are advised by the Bureau of Employees' Compensation that practically no cases involving Section 8 (f) (2) have arisen. Acceptance of the broad interpretation

employed by the court below, however, will open the door wide to possible employer defenses based on Section 8 (f) (2) in the event of any pre-existing physical infirmity and result in the imposition of increased burdens on injured employees.

Since this result departs from the usual rule of compensation for industrial injury and operates contrary to the workmen's compensation principle of relieving employees of the burdens of industrial accidents, it should not be reached unless required by the clear mandate of the statute or by other compelling factors. Cf. *National Homeopathic Hospital Ass'n* v. *Britton*, 147 F. 2d 561, 564 (App. D. C.); *Liptak* v. *Industrial Accident Commission*, 200 Cal. 39; *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Piedmont & Northern Railway Company* v. *Interstate Commerce Commission*, 286 U. S. 299, 311.

B. The evidence available from the legislative background of Section 8 (f) indicates little more than that the statute was based upon other workmen's compensation legislation, particularly the New York statute (H. Rep. No. 1190, 69th Cong., 1st sess., p. 2; Hearings before Senate Subcommittee on the Judiciary on S. 3170, 69th Cong., 1st sess., pp. 31, 33, 35, 36, 48; H. Rep. No. 1767, 69th Cong., 2d sess., p. 20), and that Section 8 (f) was probably intended to serve the same general purpose of encouraging the employment of the

handicapped as second injury provisions served in other statutes. Senate Hearings, at 36, 43; Hearings before the House Committee on the Judiciary on H. R. 9498, 69th Cong., 1st sess., pp. 172, 173, 208. The explanation for incorporating second injury provisions in the statute offered by a witness in behalf of the federal legislation is that "they have become a commonplace * * * in State compensation legislation and ought to be included in the Act." Hearings before Senate Subcommittee, *op. cit. supra*, p. 43. We may appropriately refer, therefore, to the second injury provisions in other statutes and to the evaluations made by administrative experts in the field for guidance with respect to the manner in which opposing policy considerations have been resolved.

Resort to these sources furnishes persuasive evidence that the policy of encouraging employment of handicapped workers was not intended to override the fundamental purpose of workmen's compensation legislation to free employees of the

[5] The statement of another witness of the purpose of the fund to protect a one-eyed worker from being denied employment as an "extra risk" and to protect the employer from liability for permanent total disbility upon the loss of one eye. (Hearings before House Committee, *op. cit. supra*, p. 208) merely illustrates the general purpose to encourage employment of the handicapped and throws no light upon the specific problem we have here as to whether this purpose was not limited to those handicapped persons who were within the statutory terms.

burdens of industrial accidents. Accordingly, second injury funds were established to guarantee that the employee's compensation would not be reduced notwithstanding the curtailment of the employer's liability by "previous disability" provisions. Moreover, the danger of the financial insolvency of these funds which would threaten full compensation to employees, and the delays in payment which accompany vague provisions have led to the conclusion that second injury provisions should be kept within well-defined limits notwithstanding the possible elimination of some physical handicaps from their scope. There is also reason for believing that the coverage of compensation risks by insurance dilutes the necessity for encouraging employers to hire handicapped workers. Application of these considerations to the instant case points to the necessity of precisely circumscribing "previous disability" by the statutory definitions and of avoiding the vague scope which rejection of the definitions would entail.

There seems little question that the predominant reason for the introduction of provisions reducing an employer's liability for second injuries was to remove obstacles to the employment of handicapped persons. It was believed that employers' reluctance to hire handicapped individuals stemmed from the fear that an industrial injury might subject the employer to much greater liability than a similar injury to an em-

ployee in normal physical condition. National Industrial Conference Board, Workmen's Compensation Acts in the United States: The Medical Aspect (1923), p. 128; United States Bureau of Labor Statistics Bulletin No. 577, Proceedings of the 19th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1933), p. 147; United States Division of Labor Standards Bulletin No. 94, 1947 Convention of the International Association of Industrial Accident Boards and Commissions (1948), p. 111; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 1; Dodd, *op. cit. supra,* p. 666; Kessler, *The Crippled and the Disabled* (1935), pp. 111–112.

The second injury provisions were intended to minimize these fears. However, the overwhelming majority of workmen's compensation experts recognized the need of meeting this problem without compromising the basic principles of imposing upon industry and society, rather than upon the injured employee, the burden of industrial accidents. Whatever earning capacity the injured employee had was either reduced or eliminated by the subsequent industrial accident and under the generally accepted principles of workmen's compensation legislation, it was to society's advantage, as well as for the individual's benefit, to have the employee's compensation computed on

the basis of the economic loss that he had in fact sustained regardless of his physical condition at the time he sustained it. The importance attached to fully compensating the employee is evidenced by the criticism of those few statutes which attempted to meet the problem of the handicapped worker by permitting a waiver of compensation for additional liability attributable to his handicap. United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, p. 149; United States Bureau of Labor Statistics Bulletin No. 564, Proceedings of the 18th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1932), p. 277; Dodd, *op. cit. supra*, p. 678.

Accordingly, second injury funds were provided out of which the employee was to be paid the compensation from which his employer had been relieved. United States Division of Labor Standards Bulletin No. 94, *op. cit. supra*, p. 200; United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, pp. 152, 157; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 1; Dodd, *op. cit. supra*, pp. 666, 671–672, 674; United States Bureau of Labor Statistics Bulletin No. 602, Discussions of Industrial Accidents and Diseases at the 1933 Meeting of the International Association of Industrial Accident Boards and Commissions (1934), p. 15;

United States Bureau of Labor Statistics Bulletin No. 536, Proceedings of the 17th Annual Meeting of the International Association of Industrial Accident Boards and Commissions (1931), pp. 250, 252, 269; Council of State Governments, Suggested State Legislation Program for 1947, pp. A50–A51. It is thus apparent that concern for the handicapped was not intended, as a general matter, to override other basic concepts of compensation legislation. Similarly, as we shall show, it was considered advisable to limit the special provisions designed to encourage employment of handicapped workers to situations which would not undermine effective administration of the compensation system.

Notwithstanding their more limited application, specific type second injury provisions, comparable to that which would be achieved by interpreting Section 8 (f) in accordance with the statutory definitions, are deemed adequate to meet the problem of the handicapped worker (United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), pp. 4, 7; United States Bureau of Labor Statistics Bulletin No. 536, *op. cit. supra,* p. 258) and are recommended by those experienced in the administration of workmen's compensation laws because they avoid the possible sacrifice of important compensation principles.

The majority of second injury or subsequent disability laws "either enumerate the types of

preexisting disabilities or confine second-injury coverage to disabilities incurred as a result of an industrial accident. The enumerated preexisting disabilities are usually confined to the loss or disability of a member, such as an eye, ear, hand, foot, leg." United States Division of Labor Standards Bulletin No. 94, 1947 Convention of the International Association of Industrial Accident Boards and Commissions (1948), p. 104. In 1933 the recommendation of the Committee on Workmen's Compensation Legislation adopted by the International Association of Industrial Accident Boards and Commissions was for a second injury provision specifically limited to cases involving a prior "accidental injury." United States Bureau of Labor Statistics Bulletin No. 602, *op. cit. supra*, p. 11. The recommended draft of a second injury fund provision adopted by the Association in 1944 also embodied a precisely defined coverage applicable only if the prior injury resulted in the loss of a hand, an arm, foot, leg, or an eye and the subsequent injury resulted in permanent and total incapacity. International Association of Industrial Accident Boards and Commissions, Bulletin No. 1, Discussion of Industrial Accidents and Diseases (1944), p. 199. A specific type provision was also recommended by the Council of State Governments in its legislative program for 1947. This draft, which was identical with that proposed by the Association, was also sponsored by the United States Depart-

ment of Labor and the Bureau of Employees Compensation in the Federal Security Agency. Council of State Governments, *op. cit. supra*, pp. A51–A54.

The Government's desire to avoid a construction of Section 8 (f) which would convert it into a vague provision without specific boundaries is thus adequately supported. The reasons for advocacy of provisions with precisely defined coverage have been well documented. "A vague or complicated type of provision which appears to cover all conditions and exigencies breaks down in operation." Council of State Governments, *op. cit. supra*, p. A51. Thus "in the few instances when a second-injury fund has encountered temporary financial difficulty, the main source of trouble has usually been the vagueness of the legislation, inadequate arrangement for defending claims against the fund, too small an assessment for supporting a fund of the type that was proposed, or all of these causes." United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 2. The adoption of legislation which was not "simple and specific" has resulted in "a rush of claims, administrative delays in paying claims, and the threatened or actual insolvency of the fund." *Id.* at p. 8. The "serious difficulties of financing and administration" which will follow when the compensation act requires wholesale allocations of disabilities between undefined prior physical ail-

ments and subsequent injuries have received general recognition. See International Association of Industrial Accident Boards Bulletin No. 1, *op. cit. supra*, pp. 20, 17, 19, 201–202; Kessler, *op. cit. supra*, p. 116; United States Bureau of Labor Statistics Bulletin No. 577, *op. cit. supra*, pp. 155, 157; Dodd, *op. cit. supra*, pp. 678–679; United States Bureau of Labor Statistics Bulletin No. 536, *op. cit, supra*, pp. 261–262.

The willingness to give but limited scope to the policy of encouraging the employment of handicapped workers by second injury provisions may also be influenced by the fact that most employments are covered by insurance, and that insurance rates are not based upon the character of workers employed but upon the hazard of the occupation. Association of Casualty and Surety Executives, The Physically Impaired Can Be Insured Without Penalty; Association of Casualty and Surety Executives, The Employment of Disabled War Veterans and Other Disabled Persons (1944), p. 3; United States Division of Labor Standards, Second Injury Funds as Employment Aids to the Handicapped (1947), p. 7. According to statistics maintained by the Bureau of Employees' Compensation, Federal Security Agency, for the year ending June 30, 1948, eighty-five per cent of the cases which arose under the Longshoremen's and Harbor Workers' Act were covered by insurance. There were only 268 self-insurers throughout the country. Thus, employer

reluctance to hire the handicapped may be of little consequence because of the widespread use of insurance. Limitation of the coverage of second injury provisions, therefore, does not necessarily represent any substantial sacrifice of the principle of encouraging the employment of the handicapped.

In view of the serious problems created, an indefinite second injury fund should not be implied in the absence of a clear congressional mandate. The legislative history of the provision here in question does not disclose an intent to make the statutory definitions, which establish precise boundaries, inapplicable to the phrase "previous disability." Moreover, the administrative interpretation embodied in the deputy commissioner's award, based upon experience in dealing with the problems under the Act, should not be overturned if it "is not forbidden by the law." *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478; *Unemployment Commission* v. *Aragon*, 329 U. S. 143; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 131. Accordingly, the phrase "previous disability" in Section 8 (f) should be interpreted in the light of the statutory definitions. The exemption, properly construed, is applicable only where an employee's physical incapacity results from a prior industrial accident for which, presumably, he has received some compensation. In disregarding the statutory definitions of "disability" and "injury" and holding

in effect that the employer's liability must be reduced wherever an employee's physical defect, regardless of its nature or origin, increases the extent of the disability, the court below appears to have extended the exemption beyond the limits marked by Congress.

CONCLUSION

It is respectfully submitted that the judgment of the courts below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PHILIP ELMAN,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
MORTON LIFTIN,
Attorneys.

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APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, *et seq.*, provides, in part, as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

COMPENSATION FOR DISABILITY.

SEC. 8. Compensation for disability shall be paid to the employee as follows:

* * * * *

(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a pre-

vious disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability cause by the subsequent injury: *Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

* * * * * *

REVIEW OF COMPENSATION ORDERS

SEC. 21. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act. * * *.

* * * * *

(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for ~~such death~~. Fifty per ~~centum~~ of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

* * * * *

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.

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